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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982
No. _____

COUNTY OF VENTURA,

Petitioner,

v.

JOYCE TILLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before an unrepresented indigent defendant who has already been served with a summons and complaint in a suit filed by a county for child support alone, when paternity is not at issue, can enter into a stipulated judgment to pay child support, does the Fourteenth Amendment first require the holding of a prejudgment judicial hearing at which such defendant

must waive the right to notice and the right to a hearing on the merits?

2. Does the Fourteenth Amendment require the appointment of counsel for indigent defendants in civil suits for child support alone when paternity is not at issue and when a county either appears as the plaintiff or represents the interests of the child?

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	5
INTRODUCTION	12
OPINIONS BELOW	12
JURISDICTION	13
CONSTITUTIONAL PROVISIONS INVOLVED	14
STATUTORY PROVISIONS INVOLVED	15
STATEMENT OF THE CASE	18
REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED	21
SUMMARY OF ARGUMENT	21
ARGUMENT	24

IN CIVIL SUITS FILED BY A COUNTY FOR CHILD SUPPORT ALONE AND NOT TO DETERMINE PATERNITY, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES NEITHER THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANT PARENTS NOR

TABLE OF CONTENTS
(Continued)

PAGES

ARGUMENT

A PREJUDGMENT HEARING ON THE ISSUE OF THE WAIVER OF THE RIGHT TO NOTICE AND HEARING BEFORE A STIPULATED JUDGMENT RESOLVING THE CASE CAN BE ENTERED 24

A. Stipulated Judgments for Child Support Meet Constitutional Requirements for Due Process 29

B. The Due Process Clause of the Fourteenth Amendment Does Not Require Appointment of Counsel for Indigents in Civil Suits for Child Support Alone 44

CONCLUSION 59

APPENDIX A 62

APPENDIX B 64

APPENDIX C 85

APPENDIX D 87

TABLE OF AUTHORITIES

CASES	PAGES
Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006	46-47
Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 243 N.W.2d 248	45
Billingsley v. Lincoln National Bank, 271 Md. 683, 320 A.2d 34	36,37
Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780	25,27,28,40
Buckner v. Carmack, 272 So.2d 326	37
Chittester v. LC-DC-F Employees of G.E. Federal Credit Union, 384 F.Supp. 475	37
Colonial Bank and Trust Co. v. Cahill, 424 F.Supp. 1200	37
Copeland Planned Futures Inc. v. Obenchain, 9 Wash.App.32, 510 P.2d 654	37
County of Los Angeles (Holley) v. Superior Court, 102 Cal.App.3d 926, 162 Cal.Rptr. 636	25-26

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
County of Ventura v. Castro, 93 Cal.App.3d 462, 156 Cal.Rptr. 66	25,26,29,31,41
Delaware v. Prouse, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391	27
Department of Health and Rehabilitative Services v. Heffler (Fla. Sup. Ct.) 382 So.2d 301	45
Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814	47
Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756	28,47
Hamilton v. Snodgrass (Ia. Sup. Ct.) ___ N.W.2d ___ 9 Fam L.Rptr. 2065	45
In re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428	27
In re Liu, 273 Cal.App.2d 135, 78 Cal.Rtpr. 85	58
In re Love, 11 Cal.3d 179, 113 Cal.Rptr. 89, 520 P.2d 713	28

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
In re Marriage of Carter, 19 Cal.App.3d 479, 489, 97 Cal.Rptr. 274	33
In re Marriage of Utigard, 126 Cal.App.3d 133, 178 Cal.Rptr. 546	53
In re Shelley, 197 Cal.App.2d 199, 16 Cal.Rptr. 916	58
Irmco Hotel Corp. v. Solomon, 27 Ill.App.3d 225, 326 N.E.2d 542	37,38
Isbell v. County of Sonoma, 21 Cal.3d 61, 145 Cal.Rptr. 368, 577 P.2d 188	25,26,29, 30,39,41
Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019	26
Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806	54
Lassiter v. Department of Social Services, 452 U.S. 18, 68 L.Ed.2d 640, 101 S.Ct. 2153	46,50,59
Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202	46,49,59

CASES	PAGES
Lyons v. Municipal Court, 75 Cal.App.3d 829, 142 Cal.Rptr. 449	55
Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652	39,40
Oliver v. Superior Court, 197 Cal.App.2d 237, 17 Cal.Rptr. 474	58
Ortwein v. Schwab, 410 U.S. 656, 35 L.Ed.2d 572, 93 S.Ct. 1172	49
Osmond v. Spence, 327 F.Supp. 1349	35,38
D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 31 L.Ed.2d 124, 92 S.Ct. 775	22,25,26,29, 30-31,32,33, 35,36,37,38,59
Payne v. Superior Court, 17 Cal.3d 908, 132 Cal.Rtpr. 405, 553 P.2d 565	25,27
Reynolds v. Kimmons, 559 P.2d 799, 569 P.2d 799	45
Reynolds v. Reynolds, 86 Cal.App.3d 732, 150 Cal.Rptr. 423	54

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
Ross v. Moffitt, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437	54-55
Salas v. Cortez, 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226	26,27,45,49, 50,51,52,56,58
Scott v. Danaher, 343 F.Supp. 1272	37
Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 383, 99 S.Ct. 1158	46,58
Smith v. Superior Court, 110 Cal.App.3d 422, 168 Cal.Rptr. 24	57
Specht v. Patterson, 386 U.S. 605, 18 L.Ed.2d 326, 87 S.Ct. 1209	27
State Finance Corp. v. Mcgee, 27 Ill.App.3d 421, 326 N.E.2d 518	37
Swarb v. Lennox, 405 U.S. 191, 31 L.Ed.2d 138, 92 S.Ct. 767	33-34,35
Tetro v. Tetro, 86 Wash.2d 252, 544 P.2d 17	59
Tunheim v. Bowman, 366 F.Supp. 1392	34-35,36,37

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
United States v. Kras, 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct. 631	49
Utah v. United States, 394 U.S. 89, 22 L.Ed.2d 99, 89 S.Ct. 761	43
Van Buskirk v. Todd, 269 Cal.App.2d 680, 75 Cal.Rptr. 280	53
Virgin Islands National Bank v. Tropical Ventures, Inc. 358 F. Supp. 1203	37,38
CONSTITUTIONS	
United States Constitution, Article III, § 2	14
Fourteenth Amendment	3,4,14-15,21,23,24, 27,30,31,35,48
California State Constitution, Article I, § 7	27
REGULATIONS	
United States Code, Title 42, § 654	15-16
STATUTES	
Cal. Civ. Code, § 196	45,50
§ 196a	45,50,53,55
§ 4382	50
§ 4700	50,53

TABLE OF AUTHORITIES
(Continued)

STATUTES	PAGES
Cal. Code Civ. Proc.,	
§ 473	33
§ 1209	56
§ 1209.5	56
§ 1218	56
§ 1650	54
§ 1694	50
Cal. Pen. Code, § 270	55,56,58
Cal.Welf. & Inst. Code,	
§ 11350	16-17,44,53,55
§ 11350.1	17,44,53
§ 11475.1	17-18
Revised Uniform Reciprocal Enforcement of Support Act	54
28 U.S.C., § 1257(c)	14
§ 2201(d)	13
MISCELLANEOUS	
Annot., 52 ALR.3d	58
Note, "Cognovit Revisted: Due Process and Confession of Judgment," 24 Hast. L.J. 1045 (1973)	41-43
4 Markey, Cal.Fam.Law. (1982) § 6241[1]	54

INTRODUCTION

Petitioner, County of Ventura, respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari, by which Petitioner seeks review of the judgment of the Court of Appeal of the State of California, filed June 28, 1982, reversing the judgment of the trial court, and on which hearing was denied by the Supreme Court of the State of California on September 22, 1982.

OPINIONS BELOW

On May 17, 1982, Division Four of the Court of Appeal of the State of California, Second Appellate District rendered an opinion reversing the judgment for child support entered by the Superior Court of the State of California for Ventura County, the trial court. The initial opinion was reported in the Official California Advance Sheets at 132 Cal.App.3d 767.

Petitioner County of Ventura sought a rehearing which was granted. The opinion of May 17 was vacated. A copy of the order granting rehearing is attached at Appendix A.

Thereafter on June 28, 1982, the Court of Appeal rendered a new opinion again reversing the judgment of the Superior Court. A copy of this opinion appears at Appendix B and is reported at 133 Cal.App. 3d 105, 183 Cal.Rptr. 741 (1982).

Thereafter petitioner County of Ventura filed a petition for hearing in the Supreme Court of the State of California. The petition for hearing was denied on September 22, 1982. A copy of the order denying hearing appears at Appendix C of this Petition for Writ of certiorari.

JURISDICTION

The final decision of the Court of Appeal of the State of California was filed on June 28, 1982. Thereafter petitioner County of Ventura filed a timely petition for hearing in the Supreme Court of the State of California, within the meaning of 28 U.S. Code section 2201(d), which petition was denied on September 22, 1982. A copy of the order denying hearing is attached as Appendix C.

Petitioner invokes the jurisdiction of this Court to review this decision under

28 U.S. Code section 1257(3) since the right to appointed counsel in a civil suit for child support where paternity is not at issue and the right to a prejudgment judicial hearing to determine waiver of notice and of the opportunity to be heard before a stipulated judgment can be entered against an indigent defendant in a suit for child support brought by a county as a plaintiff or on behalf of a minor child, have been claimed under the United States Constitution by respondent Joyce Tillett.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2, in relevant part:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under this Authority. . . ."

United States Constitution, Amendment XIV, in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

". . ."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, section 654 in relevant part:

"A State plan for child . . . support must -

". . . .

"(4) provide that such state will undertake -

"(B) in the case of any child with respect to whom such assignment is effective, to secure support for such child from his parent. . . .

"(6) provide that (A) the child support collection or paternity determination services established

under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State. . . ."

California Welfare and Institutions Code section 11350 in relevant part:

"In any case of separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to such family, the noncustodial parent or parents shall be obligated to the county for an amount equal to:

"(a) The amount specified in an order for the support and maintenance of such family issued by a court of competent jurisdiction; or in the absence of such court order;

"(b) The amount of aid paid to the family during such period of separation or desertion limited by such parent's reasonable ability to pay during that period in which aid was granted; and

"(c) Such obligation shall be reduced by any amount actually paid by

such parent during such period of separation or desertion for the support and maintenance of such family.

"The district attorney shall take appropriate action pursuant to this section in the superior court of the county which provided aid under this chapter. . . ."

California Welfare and Institutions Code section 11350.1 in relevant part:

"Notwithstanding the provisions of any other statute, in any action brought by the district attorney for the support of a minor child or children, the action may be prosecuted in the name of the county on behalf of such minor child or children. The mother shall not be a necessary party in such action but may be subpoenaed as a witness. . . ."

California Welfare and Institutions Code section 11475.1 in relevant part:

"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have responsibility for

promptly and effectively enforcing the obligation of parents to support their children and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to enforce this obligation when the child is receiving public assistance and when requested to do so by the individual on whose behalf the enforcement efforts will be made when the child is not receiving public assistance . . . ."

STATEMENT OF THE CASE

The plaintiff in the underlying California Superior Court suit was the County of Ventura, acting on behalf of two minor children of respondent Joyce Tillett. These two children were not in respondent Tillett's custody, and the County had provided them welfare benefits. Paternity, or in this case "maternity," was never and is not now an issue in this case.

On December 4, 1978, a civil suit was commenced against defendant-respondent Tillett in Ventura County Superior Court

under California Welfare and Institutions Code sections 11350 and 11350.1. The complaint sought ongoing monthly child support for the children in the amount of $120.00 per child per month for a total of $240.00 per month, plus reimbursement for welfare funds previously provided the children.

Respondent was served with a copy of the complaint and the summons. The summons was on a form approved by the California Judicial Conference which contained in bold faced type the statement:

> "NOTICE! You have been sued. The court may decide against you without being heard unless you respond within 30 days. Read the information below."

The summons then gave directions for filing an answer, repeated the time limit for answering, advised her that a default judgment could be entered if she did not answer and stated, again in bold faced type, that if she wished to seek the advice of an attorney she should do so promptly so that any written response would be filed on time (A copy of the summons is attached to this Petition for Writ of Certiorari as Appendix D).

The record does not show that appellant contacted an attorney. Instead, after having been served with a copy of the summons and complaint, respondent contacted the District Attorney's office in Ventura County where she worked out a stipulated judgment. The judgment, filed on January 26, 1979, required that respondent pay monthly child support in the amount of $50.00 per child per month and that she reimburse the county for welfare previously provided the children in the amount of $1,148.00 at the rate of $5.00 per month. At this time appellant had just received her license to sell insurance.

Approximately seven months later, on August 27, 1979, respondent was cited with civil contempt for wilfully failing to make her child support payments. After waiving her right to counsel, on October 12, 1979, she pleaded guilty to four counts of contempt and was placed on probation.

On August 6, 1980, approximately one year after the filing of the order to show cause in the contempt proceeding, petitioner sought to revoke respondent's

probation, the hearing on the revocation was continued to October 30, 1980. On October 30 and 31, 1980, respondent, through counsel, filed motions to vacate the judgment of January 26, 1979, based upon the theory that she had not been represented by an attorney when she stipulated to the judgment and had not waived her right to such representation, and further, based upon a claim of extrinsic fraud. When her motions were denied, respondent appealed to the California Court of Appeal.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari in this case should be granted. The Fourteenth Amendment does not mandate a prejudgment hearing before a stipulated judgment can be entered in child support cases, and the California Court of Appeal erred in finding such a requirement.

This stipulated judgment in this case met all the requirements for due process and was the result of an arm's length transaction.

However, if in fact a stipulation for a judgment entered into after service of a summons and complaint could be considered some form of confession of judgment, then, under D.H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, such a stipulation is not per se unconstitutional. Furthermore, under Overmyer, despite some lower court authority to the contrary, no prejudgment hearing as to the validity of the waiver of the right to notice and hearing is constitutionally required before judgment can be entered.

On the other hand, if it is assumed that confessions of judgment do require prejudgment hearings, stipulations for judgment entered into by defendant non-custodial parents after service of a summons and complaint, are distinguishable from confessions of judgment of the sort entered into by consumers in an installment sales contract before any legal controversy has arisen. In the case of the stipulated

judgment, the defendant has already received notice of the pending legal action and of the opportunity to appear to contest the issue on the merits. Indeed the stipulated judgment is closer to a settlement and release than to a cognovit.

For all these reasons the California Court of Appeal erred in holding that a prejudgment hearing was required with respect to the stipulation involved in this case.

Nor does the Fourteenth Amendment require appointment of counsel when only child support is at issue in a purely civil proceeding. The only interests involved pertain to money, there is little risk of erroneous results since the issues involved are simple, and finally, deprivation of liberty does not result from a judgment for the plaintiff.

It is extremely important that this Court grant the petition for writ of certiorari in this case. If allowed to stand, the holding of the California Court of Appeal will benefit neither society in general nor children in particular. If certiorari is not granted, thousands

of child support judgments will be treated as constitutionally void and thousands of children will then be left without support from their parents.

ARGUMENT

IN CIVIL SUITS FILED BY A COUNTY FOR CHILD SUPPORT ALONE AND NOT TO DETERMINE PATERNITY, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES NEITHER THE APPOINTMENT OF COUNSEL, NOR A PREJUDGMENT HEARING ON THE ISSUE OF THE WAIVER OF THE RIGHT TO NOTICE AND HEARING, BEFORE A STIPULATED JUDGMENT RESOLVING THE CASE CAN BE ENTERED

In its opinion reversing the order of the California Superior Court, the California Court of Appeal held that child support judgments carry with them a threat of incarceration.[1/] Therefore the court concluded if a defendant in a suit for

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1. The question whether imprisonment can be considered the result of a child support proceeding is considered in part B(2) of the Argument, infra, p. 55.

child support alone has not had the assistance of counsel[2] in agreeing to a stipulated judgment with the state, there must be a judicial determination of the issue of the waiver of the due process right[3] to notice and a hearing before

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2. The question whether appointed counsel is constitutionally mandated is dealt with in Part B of the Argument infra, page 44.

3. The California Court of Appeal's decision in this case was based solely on federal grounds. The court relied upon the cases of Isbell v. County of Sonoma (1978) 21 Cal.3d 61, 577 P.2d 188, 145 Cal.Rptr. 368, cert. denied as petition was untimely filed (1978) 439 U.S. 996; County of Ventura v. Castro (1979) 93 Cal.App.3d 462, 156 Cal.Rptr. 66, cert. denied (1980) 494 U.S. 1098; D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 174; Boddie v. Connecticut (1971) 401 U.S. 371, 28 L.Ed 2d 113, 91 S.Ct. 780; Payne v. Superior Court (1976) 17 Cal.3d 908, 914, 132 Cal.Rptr. 405, 553 P.2d 565; County of Los Angeles (Holley) v. Superior

judgment can be entered. In the absence of such a prejudgment hearing, the child

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Court (1980) 102 Cal.App.3d 926, 162 Cal. Rptr. 636; and Salas v. Cortez (1979) 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226, cert. denied (1979) 444 U.S. 900. (Opn. of Ct. of App., App. B, pp. 76, 77, 78, 80-83.)

In Castro at pp. 468-470, the California Court of Appeal referred to D.H. Overmyer Co. v. Frick Co., supra, (1972) 405 U.S. 174, and Johnson v. Zerbst (1938) 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, but based its decision upon Isbell v. County of Sonoma, supra (1978) 21 Cal.3d 61. Isbell held a California statute governing certain confessions of judgment to be unconstitutional as a denial of due process. (p. 39.) Isbell was decided solely upon federal constitutional grounds. (See Isbell v. County of Sonoma, supra, 21 Cal.3d 61, 65, 75, 577 P.2d 188, 190, 196, 145 Cal.Rptr. 368, 370, 376.)

County of Los Angeles (Holley) was based upon Salas v. Cortez, supra. In

support judgment is void as unconstitutional. (Cal. Ct. of App. Opn., App. B, pp. 82-83.)

Salas at pages 26-27, the California Supreme Court noted that the Fourteenth Amendment to the United States Constitution as well article I, section 7, subdivision (a) of the California Constitution require that individuals receive due process of law. However, if at issue at all, the "state constitutional holding depended upon the state court's view of the reach of the . . . Fourteenth Amendment." (Delaware v. Prouse (1979) 440 U.S. 648, 653, 59 L.Ed.2d 660, 99 S.Ct. 1391.) In its opinion in Salas the court relied on either United States Supreme Court cases (e.g., Boddie v. Connecticut, supra (1971) 401 U.S. 371; In re Gault (1967) 387 U.S.1, 18 L.Ed.2d 527, 87 S.Ct. 1428; Specht v. Patterson (1967) 386 U.S.605, 18 L.Ed.2d 326, 87 S.Ct. 1209) or California cases which themselves relied on United States Supreme Court cases, (e.g., Payne v. Superior Court, supra (1976) 17 Cal.3d 890, relying

It is respectfully submitted that the California Court of Appeal erred in reaching this holding, for respondent was deprived of no constitutional right and the judgment of the California Superior Court, the trial court, was correct.

Moreover, if this Court does not hear this case on the merits, substantial harm will result. Thousands of existing child support judgments will be found to be constitutionally void (not voidable), and thousands of children will suddenly be left without support from their parents.

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inter alia on Boddie v. Connecticut, supra; In re Love (1974) 11 Cal.3d 179, 113 Cal.Rptr. 89, 520 P.2d 713, relying on Gagnon v. Scarpelli (1973) 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756.)

A. Stipulated Judgments for Child Support Meet Constitutional Requirements for Due Process

1. If District Attorney -- Noncustodial Parent Stipulated Judgments are Indeed a Form of Confession of Judgment, The Decision Below Conflicts with the Decision of This Court Which Holds that Confessions of Judgment are Not per se Unconstitutional.

In concluding that stipulated judgments were a form of confession of judgment and in finding the stipulated judgment in this case unconstitutional as a denial of due process, the California Court of Appeal based its decision upon Isbell v. County of Sonoma, supra, (1978) 21 Cal.3d 61, cert. denied as petition was untimely filed (1978) 439 U.S. 996; County of Ventura v. Castro, supra (1979) 93 Cal.App.3d 462, 469, cert. denied (1980) 444 U.S. 1098; and D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 184, 188. (Opn. of Ct. of App., Exh. B, pp. 76-79, 82-83.)

Isbell held that the California confession of judgment statute denied debtors due process under the Fourteenth Amendment because the statute did not permit prejudgment judicial determinations as to the validity of debtors' waivers. The Isbell court noted that the availability of post judgment relief did not cure the unconstitutionality of the statute. In reaching its decision, the Isbell court concluded that D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 174, was not in point. It reasoned that Overmyer did not hold that a confession of judgment procedure, which required the entry of judgment without a prior showing of waiver, complied with due process requirements. (Isbell v. County of Sonoma, supra, 21 Cal.3d 61 71-72.)

The California Supreme Court clearly erred in Isbell in not recognizing that this Court's holding in D.H. Overmyer Co. v. Frick Co., supra, 405 U.S. 174, was controlling. In Overmyer, this Court upheld the validity of a judgment entered on a cognovit containing a warrant of attorney stating: "Our holding necessarily

means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process." (405 U.S. at p. 188.)

In Castro, the California Court of Appeal relied on Isbell in striking down as unconstitutional per se a state statute allowing district attorneys and individuals to agree to the entry of a Judgment of Paternity and/or child support without the district attorney's first filing and serving a civil complaint. In his dissenting opinion from the denial of certiorari in County of Ventura v. Castro, supra, 444 U.S. 1098, 1101, joined by Justice Rehnquist, Justice Blackmun stated that he believed that Castro presented a substantial question as to whether the California Court of Appeal's decision in Castro was consistent with Overmyer. He stated that he would grant the petition and set the case for argument because the issue was bound to recur.

As Justice Blackmun predicted, the issue has recurred, in fact, from the same California Court of Appeal which wrongly decided Castro. The decision in the instant case was also reached in clear

violation of this Court's conclusion in Overmyer that confessions of judgment are not unconstitutional per se but must be analyzed on a case by case basis.

Like the California Supreme Court in Isbell and the California Court of Appeal in Castro, the California Court of Appeal also failed to follow Overmyer in this case.

Petitioner does not dispute that it is possible for individual agreements to be invalid on their own facts, but possible deficiencies in individual cases should not serve to invalidate thousands of stipulated judgments entered into over a period of years. Certiorari should be granted here; otherwise thousands of children will be left without support.

2. There Is a Conflict Among the Lower Courts on the Proper Application of Overmyer v. Frick as to the Necessity of a Prejudgment Hearing for Confessions of Judgment

The California Court of Appeal held that respondent's right to due process was violated because there was no hearing

prior to entry of judgment[4/] (Opn. of Ct. of App., App. B, pp. 82-83.) In Overmyer v. Frick, supra, 405 U.S. 174, this Court held that confessions of judgment are not unconstitutional per se and that a debtor may validly waive the right to notice and hearing and to present a defense on a note. In both Overmyer and its companion case, Swarb v. Lennox (1972) 405 U.S. 191,

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4. Under California Code of Civil Procedure section 473, the court which has rendered a judgment may, upon such terms as may be just, set aside the judgment taken against a party by mistake, inadvertence, surprise, or excusable neglect, provided that the application is accompanied by a copy of the proposed answer and that the application is made within a reasonable time, but not more than six months after the judgment was taken. Since January 1, 1982, the moving party has not been required to file an affidavit or declaration as to the existence of a meritorious defense. (See In re Marriage of Carter, 19 Cal.App.3d 479, 489. 79 Cal.Rptr. 274, 279.)

the Court considered and upheld confession of judgment statutes which did not provide for a prejudgment hearing on the validity of the waiver. Despite the fact that these cases did not require a prejudgment hearing, lower courts are nevertheless divided as to whether such a hearing is required.

The clash between the lower courts is evident in the decision of the three judge federal district court in Tunheim v. Bowman (D. Nev. 1973) 366 F. Supp. 1392. Tunheim involved a challenge to the constitutionality of Nevada's confession of judgment statutes. There plaintiffs alleged that the failure of the statute to provide for notice and hearing prior to judgment rendered them unconstitutional. The court dissolved the three judge panel, holding that prior controlling decisions rendered insubstantial any claim that the Nevada statutes were unconstitutional. The court stated:

> "The allegation that the Nevada confession of judgment statutes are on their face unconstitutional because they do not incorporate a requirement

> of prior notice and hearing before judgment is entered falls before the decision of the Supreme Court in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124. . . . The Overmeyer case specifically holds that statutes legalizing cognovit clauses without a requirement of prior notice and hearing are not per se unconstitutional under the due process clause of the Fourteenth Amendment." (366 F.Supp. at 1393-1394.)

The Tunheim court went on to reject the interpretation of Overmyer made by a federal district court in Delaware in a series of opinions beginning with Osmond v. Spence (D.Del. 1971) 327 F.Supp. 1349. In Osmond, a three-judge federal court had held that Delaware's confession of judgment statutes were unconstitutional because they did not provide prejudgment notice and hearing. On appeal, this Court ordered the case remanded in light of Swarb and Overmyer. (405 U.S. 971 (1972).) On remand, the trial court maintained its original opinion that

notice and hearing were required prior to entry of judgment. ((D.Del. 1972) 350 F.Supp. 124.)[5/]

The Tunheim court disagreed with this interpretation of Overmyer:

> "The Overmyer case did not leave the question open. It specifically held that a statutory scheme which does not provide for notice and hearing prior to entry of a confessed judgment did not run afoul of due process requirements." (366 F.Supp. at 1394.)

The Maryland Court of Appeals holds a view similar to that expressed in Tunheim:

> "In any event, Overmyer cannot be read to mandate a 'waiver hearing' prior to entry of a confessed judgment and, insofar as one may be required thereafter, it was clearly available to appellants at the hearing on their motion to vacate. No more is required." (Billingsley v. Lincoln National Bank (1974) 271 Md. 683, 693, 320 A.2d 34, 39.)

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5. No further appeal was taken.

In accord with Tunheim and Billingsley are the decisions in Irmco Hotels Corp. v. Solomon (1975) 27 Ill.App.3d 225, 326 N.E.2d 542, 544; State Finance Corp. v. McGee (1975) 27 Ill.App.3d 421, 326 N.E.2d 518, 521; Copeland Planned Futures, Inc. v. Obenchain (1973) 9 Wash.App.32, 510 P.2d 654, 657; and Buckner v. Carmack (La.Sup.Ct. 1973) 272 So.2d 326, 331, app. dismissed (1974) 417 U.S. 901. (See also Colonial Bank & Trust Co. v. Cahill (N.D. Ill. 1976) 424 F. Supp. 1200; Chittester v. LC-DC-F Employees of G.E. Federal Credit Union (W.D. Pa. 1974) 384 F. Supp. 475, 479.)

In contrast, Virgin Islands National Bank v. Tropical Ventures, Inc. (D.V.I. 1973) 358 F. Supp.1203, 1206-1208 (District Court ordered evidentiary hearing before it would approve confession of judgment) and Scott v. Danaher (N.D. Ill. 1972) 343 F. Supp. 1272, 1277-1278 (decided prior to Overmyer) are in accord

with Osmond v. Spence, supra.[6/]

The conflicting interpretations of Overmyer made by the lower courts as to the necessity of a prejudgment hearing points out the importance in resolving the constitutional requirements of due process within the context of this case. Accordingly a writ of certiorari should issue to resolve this conflict.

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6. In addition to the conflict with respect to the necessity of a prejudgment hearing, lower courts also disagree as to the proper allocation of the burden of proof in a proceeding challenging the debtor's waiver. (Cf. Osmond v. Spence, supra, at p. 127 with Virgin Islands National Bank v. Tropical Ventures, Inc., supra, at p. 1207 and Irmco Hotels Corp. v. Solomon, supra.) In the instant case the California Court of Appeal did not consider the question of burden of proof.

3. Even Assuming that Confessions of Judgment Require a Prejudgment Hearing to Insure that Defendants are Given Notice of the Proceedings and of Their Right to be Heard, Stipulations for Entry of Judgment Made after Service of Process are Distinguishable from Traditional Confessions of Judgment Because the Defendant Who has been Served has Received Notice of the Proceeding and of the Right to a Hearing

In Mullane v. Central Hanover Bank & Trust Co. (1950) 339U.S. 306, 313, 94 L.Ed. 865, 872-873, 70 S.Ct. 652, 656-657, cited in Isbell at page 68, the court stated that due process requires "notice and opportunity for hearing appropriate to the nature of the case."[7] (See also

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7. At one point in Isbell the court appears to indicate that a hearing is always required (Isbell v. County of Sonoma, supra, at p. 68), as opposed to an opportunity for a hearing. However, if an actual hearing were required for due process, all default judgments would be

Boddie v. Connecticut, supra (1971) 401 U.S. 371, 377, 378.) "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." (Mullane v. Central Hanover Tr. Co., supra, 339 U.S. 306, 313.) "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (Id., at p. 314.) Here the record clearly establishes that respondent was served with a summons and complaint. At the time of service in this case, the prescribed form of summons as revised January 1, 1977, advised the defendant that if he or she desired to seek the advice of an attorney he or she should do so promptly so that the written response, if any, might be filed on time. (See App. D, a copy of the summons served on respondent and proof of service.) Since respondent

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unconstitutional. (See Boddie v. Connecticut, supra (1971) 401 U.S. 381, 378.)

has had proper notice and the opportunity to appear as required by the Fourteenth Amendment, the issue of waiver of notice and opportunity to appear is not relevant. Accordingly this case is distinguishable from Isbell and Castro, and from those cases cited above which mandate a hearing, all of which dealt with the question of waiver.[8/]

A second means of distinguishing this case from the cases requiring a prejudgment hearing is that this case involved a stipulated judgment and not a cognovit. As one commentator has noted:

> "Today, two types of confessed judgments are recognized; the cognovit actionem and the cognovit note. The first is the debtor's

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8. It is an anomaly that respondent claims her due process rights were violated when she voluntarily stipulated to the judgment in this case, for if she had never contacted the District Attorney and if a default judgment had been entered instead, no one could assert that her rights had been violated.

written confession of liability, usually prepared after service of process. The written acknowledgment is then admissible in a judicial proceeding, where judgment is entered. Since notice of the action and the opportunity to litigate are the fundamentals of procedural due process, such a procedure raises no significant due process problems. This method of confessing judgment without action avoids needless litigation.

"The harshness of confessed judgments arises under the second form, the cognovit note, which is the subject of recent litigation. This type of note, incorporated in a contract or other document, attempts in advance of any legal controversy to authorize (1) the assumption of in personam jurisdiction over the debtor in case of default and (2) the entering of judgment without notice and hearing for the amount confessed. The cognovit note usually consists of three provisions: a consent to

jurisdiction, a waiver of notice and hearing, and a warrant of attorney authorizing judgment. Upon the slightest default, the creditor, without notifying the debtor that legal action has been initiated, can have an attorney confess judgment for the debtor in the amount due. [Fns. omitted; emphasis in original.]" (Note, "Cognovit Revisited; Due Process and Confession of Judgment," (24 Hast. L.J. (1973) at pp. 1045-1046).

However the case at bar involves a stipulated or consent judgment which is akin to a settlement or release. It is certainly not a cognovit note. Here after service of process, both parties came together and worked out an agreement satisfactory to both. The judgment was by stipulation or consent and was clearly valid. (Cf. Utah v. United States (1969) 394 U.S. 89, 93 (Parties may limit the issues tendered to a court for decision by stipulation).)

Petitioner respectfully submits that the holding of the California Court of

Appeal distinguishing due process requirements in contested and uncontested cases (Opn. of Ct. of App., App. B, p. 76) and equating cognovit notes with by stipulations entered into after service of process (Opn. of Ct. of App., App. B, pp. 78-79) is without authority and is clearly erroneous. Here respondent received constitutionally proper notice, had the opportunity to be heard in the same manner as any other civil litigant, and thereafter agreed to a compromise. There was no constitutional error.

Accordingly, the petition for writ of certiorari should be granted.

B. The Due Process Clause of the Fourteenth Amendment Does not Require Appointment of Counsel for Indigents in Civil Suits for Child Support Alone

When a county sues to obtain child support alone under California Welfare and Institutions Code sections 11350 and 11350.1 as in the instant case, the county is not seeking to establish a child support obligation or a parent-child relationship. Parenthood is not at issue,

and the obligation to support already exists as a matter of law under California Civil Code sections 196 and 196a because of the preexisting parent-child relationship.

Although cases in other jurisdictions have held that counsel is required in paternity suits,[9/] the rationale for such holdings does not support a requirement under the Fourteenth Amendment for court-appointed counsel in civil suits where the only question at issue is child support and paternity is not being litigated. (See Artibee v. Cheboygan Circuit Judge (1976) 397 Mich. 54, 243 NW2d 248; Reynolds v. Kimmons (Sup.Ct. Alaska) 599 P.2d 799; Salas v. Cortez, supra, 24 Cal.3d 22.)

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9. Respondent does not concede that the Fourteenth Amendment requires appointed counsel in paternity actions; however that issue is not before the Court in this case. (See, e.g., Dept. of Health and Rehab. Serv. v. Heffler (Fla. Sup.Ct. 1980) 382 So.2d 301; Hamilton v. Snodgrass (Iowa Sup.Ct. 1982) ___N.W.2d ___, 9 Fam L.Rptr. 2065.)

Indeed, based upon an analysis of the private interests involved in a suit for child support alone, the governmental interests involved, the risk that the procedures will lead to erroneous results, the probable value of the procedure requested by the private party, and the presumption against appointing counsel except where deprivation of liberty is really at issue (see Lassiter v. Department of Social Services (1981) 452 U.S. 18, 27, 68 L.Ed.2d 640, 649, 101 S.Ct. 2153, 2159; Little v. Streater (1981) 452 U.S. 1, 13, 68 L.Ed.2d 627, 636, 101 S.Ct. 2202, 2209), it is clear that appointed counsel in the circumstances of this the case is not constitutionally compelled.[10] It is

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10. The absolute due process requirement in criminal cases is that no person be imprisoned for an offense unless he is represented by counsel at trial. (Scott v. Illinois (1979) 440 U.S. 367, 373, 59 L.Ed.2d 383, 389, 99 S.Ct. 1158, 1162; Argersinger v. Hamlin (1972) 407 U.S. 25, 37, 32 L.Ed.2d 530, 538, 92 S.Ct. 2006,

further urged that this Court consider this issue on the merits in order to finally resolve the question.

2012.) It also requires the appointment of appellate counsel for indigents in criminal proceedings where an appeal is a matter of right. (Douglas v. California (1963) 372 U.S. 353, 356-358, 9 L.Ed 2d 811, 814-815, 83 S.Ct. 814, 816-817.) Unlike the absolute right to counsel mandated by specific provisions of both federal and state constitutions for individuals accused of criminal offenses, the right to counsel in other than criminal proceedings is conditioned and determined on a case by case basis. (Cf. Gagnon v. Scarpelli, supra, (1973) 411 U.S. 778, 790.) Clearly however, the nature of civil suits for child support is distinguishable from the limited situations in which appointment of counsel has been required in other than criminal proceedings.

Failure to grant certiorari in this case will mean that thousands of existing child support judgments will be ruled unconstitutional as void. Thousands of children will then be left without support.[11]

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11. Petitioner stresses that the issue is not whether the presence of counsel might be helpful or even whether a state legislature could by statute provide for appointing counsel. The question is whether the appointment of counsel is mandated be the Fourteenth Amendment. An additional consequence of holding that counsel is mandated in a whole new class of cases is that counsel will in fairness press for a statute allowing them to be compensated. Given this time of limits on governmental resources, this means that the Legislature will be forced to appropriate money for counsel fees rather than for education or health services or other vital social programs.

1. No Fundamental Interests Are at Stake

In Little v. Streater, supra (1981) 452 U.S. 1, 16, footnote 2, this Court held that the interests of the child and the indigent defendant in paternity actions are constitutionally significant as opposed to those of an indigent seeking discharge in bankruptcy or seeking appellate review of an agency determination resulting in reduced welfare benefits. (Cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28 (freedom from an incorrect imposition of the parent-child relationship is a compelling interest); see United States v. Kras (1973) 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct. 631; Ortwein v. Schwab (1973) 410 U.S. 656, 35 L.Ed.2d 572, 93 S.Ct. 1172.)

However unlike the situation in Little v. Streater, supra, or in Salas v. Cortez, supra, no fundamental personal or family relationships are involved here.

The establishing of a certain dollar amount as due for child support neither profoundly affects the defendant's life, nor affects reputations, nor disrupts any

established family relationship (cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28-29; dissenting opinion of Justice Blackmun in Lassiter v. Department of Social Services, supra, 452 U.S. at p. 35; and dissenting opinion of Justice Stevens, at p. 59; Cal. Civ. Code, § 4382; Cal. Code Civ. Proc., § 1694). Such a judgment does not establish a new support obligation but instead simply tells the parent how much he or she must pay and serves to enforce the duty to support the law already imposed by virtue of parenthood alone under California Civil Code sections 196 and 196a. (See Lyons v. Mun. Ct., 75 Cal.App.3d 829, 840-841, 142 Cal.Rptr. 449, 453-454.) Moreover, unlike a civil judgment in a breach of contract case, a judgment for future child support in California can be modified downward a year, a month, or even a day after the original judgment was entered if the defendant's financial circumstances have become worse during the interim. (Cal. Civ. Code, § 4700.)

Indeed, respondent's interests are not qualitatively different from those of any

other civil litigant against whom a money judgment is sought. The due process rights of criminal defendants should not be extended to ordinary civil litigants who, like respondent, have but a monetary interest in the outcome of the litigation.

2. There Is No Likelihood of Erroneous Results if Judgment is for the Plaintiff

Another concern of the Court of Appeal was the asserted disparity of bargaining power between indigent defendants and the state and thus the likelihood of erroneous results. (Opn. of Ct. of App., App. B., pp. 80-82; see also Salas v. Cortez, supra, 24 Cal.3d 22, 31.) Even assuming that there is in fact "disparity" in paternity cases, the crux of the disparity in the paternity context arises from the complexity of litigating the question of paternity, for paternity actions can involve such arcane matters as discovery and scientific blood grouping tests, and counsel for the plaintiff can be a specialist in handling paternity

actions.[12/] (See Salas v. Cortez, supra, at pp. 31-32.) However, such a situation

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12. The "disparity" cannot arise from the mere fact that a governmental entity is a party to the proceeding or is representing the interests of a person involved in the proceeding (here the minor child or children) and a private party is on the other side. If such were the case, attorneys would be constitutionally required in each and every case where a private citizen is on one side of a case and a government attorney is on the other side, such as all traffic infractions, all licensing actions, all condemnation proceedings, all actions to abate a nuisance filed by a governmental entity, all consumer actions filed by a governmental entity, all environmental actions filed by a governmental entity and all tort and contract actions in which a governmental entity is either a plaintiff or a defendant. Apointed counsel could also be required when a large corporation such as General Motors or State Farm

does not exist in suits to obtain child support, for even where, as here, there is no preexisting child support order, the issues presented in a suit under California Welfare and Institutions Code sections 11350 and 11350.1 are very simple. These are: (1) Is the person who is actually served the non-custodial parent defendant named in the complaint? (2) If so, what are the non-custodial parent's assets and income and expenses, what is the non-custodial parent's current ability to earn, and what is the amount necessary for the support, maintenance, and education of the child? (See Cal. Civ. Code, §§ 196a, 4700; In re Marriage of Utigard, 126 Cal.App.3d 133, 143, 178 Cal.Rptr. 546, 551.)

Moreover, any actual trial proceeding is not complex since the matter is heard as a suit in equity and there is no right to a trial by jury. (Van Buskirk v. Todd, 269 Cal.App.2d 680, 685-686, 75 Cal.Rptr.

Insurance is suing an individual citizen if mere size or economic power of a party were the determining factor.

280, 283; Kyne v. Kyne, 38 Cal.App.2d 122, 133, 100 P.2d 806, 812; 4 Markey, Cal.Fam.Law (1982), § 62.41[1]; see also Reynolds v. Reynolds, 86 Cal.App.3d 732, 734-735, 150 Cal.Rptr. 423, 425 (No right to jury trial in suit for child support under the Revised Uniform Reciprocal Enforcement of Support Act, Code Civ. Proc., § 1650 et seq., since the fixing of support is equitable in nature.) Thus, because the issues and the proceedings are simple, disparity is not an issue, and an appointed attorney is not necessary to avoid erroneous results.[13]

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13. In few lawsuits are the sides ever truly equally matched. "[T]he fact that a particular service might be of benefit to [a] defendant does not mean that the service is constitutionally required." (Ross v. Moffitt (1974) 417 U.S. 600, 616, 41 L.Ed.2d 341, 354, 94 S.Ct. 2437, 2446-2447.) California has no duty to "duplicate the legal arsenal that may be privately retained" by a defendant. It must only "assure the indigent defendant an adequate opportunity to

3. The Defendant's Liberty Is Not at Stake

The California Court of Appeal was concerned with the question of the possibility of incarceration. (Opn. Ct. of App., App. B, pp. 80-82.) However, under California Civil Code sections 196 and 196a, a parent who has never been sued under California Welfare and Institutions Code section 11350 is still obligated to provide support by virtue of parenthood alone. Without reference to the California Welfare and Institutions Code, any parent who wilfully fails to support his or her child violates California Penal Code section 270 and can be punished by imprisonment in the county jail for up to one year. (See Lyons v. Municipal Court, supra, 75 Cal.App.3d 829, 838-841, 142 Cal.Rptr. 449, 452-454.) Respondent in

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present his claim fairly . . . ." (Ross v. Moffitt, supra, at p. 616 (discussing rights of criminal defendants to counsel in seeking discretionary appeals). Here respondent was in the same position as every other civil litigant.

this case could have been charged with a violation of California Penal Code section 270 whether or not the civil suit for child support had ever been filed. The filing of a suit for child support does not have a significant bearing on any subsequent criminal proceeding which might follow. (Cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28-29.)

It is true that finding a person in civil contempt (Cal.Code Civ. Proc., §§ 1209, 1209.5, 1218) does require the preexistence of a valid court order; nevertheless the concerns expressed in the California Court of Appeal's opinion (Opn. of Cal. Ct. of App., App. B, pp. 80-82.) are answered by the fact that contempt under California Code of Civil Procedure section 1209.5, like California Penal Code section 270, requires a subsequent intervening act,[14] the wilful violation of

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14. Obviously the hazard of possible incarceration is too attenuated to require appointment of counsel in this case as in suits in which an injunction might issue even though the defendant might wilfully

the order by the wilful refusal to pay, and someone who does not have the financial ability to pay in accordance with the order cannot be guilty of

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flaunt the court's judgment at some time in the future. (Cf. Smith v. Superior Court, 110 Cal.App.3d 422, 426 (Right against self-incrimination does not apply in case where an injunction is sought although violation of injunction could lead to imprisonment through contempt).) If the California Court of Appeal is correct in requiring counsel in this case, would it not necessarily follow that appointed counsel are constitutionally required in all divorce or marriage dissolution proceedings since in most jurisdictions, if alimony or child support or child custody is determined and ordered, a contempt proceeding could be filed at some future time if one of the parties wilfully violates the trial court's order?

contempt in California.[15/] (Oliver v. Superior Court, 197 Cal.App.2d 237, 241-242, 17 Cal.Rptr. 474, 476 477. It is improper to assume that defendants will wilfully flaunt support orders of the trial court or will fail to provide such support as they can.

It is clear that neither a civil contempt proceeding nor a criminal prosecution and a sentence to prison is a consequence of the civil judgment taken against respondent. Therefore appointed counsel is not constitutionally required. (Cf. Scott v. Illinois, supra (1979) 440 U.S. 367, 373, 59 L.Ed.2d 383, 388-389, 99 S.Ct. 1158, 1161-1162; See Tetro v.

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15. In California, appointed counsel is available in both civil contempt and Penal Code section 270 proceedings. (See Salas v. Cortez, supra, 24 Cal.3d 22, 27, fn. 2; see In re Liu, 273 Cal.App.2d 135, 141, 78 Cal.Rptr. 85, 90-91; In re Shelley, 197 Cal.App.2d 199, 201, 16 Cal.Rptr. 916, 918; Annot. (1973) 52 A.L.R.3d 1002.)

Tetro (1975) 86 Wash.2d 252, 255, fn. 1, 544 P.2d 17, 20, fn. 1.) The Constitution does not mandate appointment of counsel under the facts of the case at bar, for respondent is an ordinary civil litigant and only money is at issue.

Accordingly, the Petition for Writ of Certiorari should be granted in this case, and on hearing the case, this Honorable Court should reverse the judgment of the California Court of Appeal.

CONCLUSION

This case presents an excellent opportunity to define more clearly the meaning of Lassiter and Little and the constitutional requirements for appointed counsel in civil cases.

Assuming that a stipulation can be considered a confession of judgment, this case can resolve the question which certain courts perceive to have been left open in D.H. Overmyer, whether a prejudgment judicial hearing is constitutionally required.

Petitioner submits that the California Court of Appeal went too far in this case

and that this Court should resolve these issues. If allowed to stand, the holding of this case that stipulated judgments are void will immediately leave thousands of children without any support. Clearly the Fourteenth Amendment does not require appointment of counsel where, as in this case, only money is at issue; and, further, the Fourteenth Amendment does not require a prejudgment hearing before a stipulated judgment can be entered.

For the foregoing reasons, then, it is respectfully requested that a writ of certiorari issue in this to resolve these important issues and that thereafter this Honorable Court reverse the Judgment of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

COUNTY OF VENTURA, Plaintiff and Respondent, v. JOYCE TILLETT, Defendant and Appellant.	2 Civ. No. 63044 (Super. Ct. No. D-98169) ORDER GRANTING REHEARING AND RESUBMITTING CASE

THE COURT:*

Good cause appearing, a rehearing is ordered in the above entitled matter, the opinion filed herein on May 17, 1982, is vacated, and the matter is resubmitted as of this date.

COURT OF APPEAL-SECOND DIST.
FILED
JUN 14 1982
CLAY ROBBINS, JR. Clerk
Deputy Clerk

* KINGSLEY, Acting P.J.; McCLOSKY, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COUNTY OF VENTURA,	2 Civ. No. 63044
Plaintiff and	(Super. Ct. No. D 98169)
Respondent,	
v.	COURT OF APPEAL-SECOND DIST.
JOYCE TILLETT,	FILED JUNE 28, 1982
Defendant and	CLAY ROBBINS, JR. Clerk
Appellant.	_____
_____	Deputy Clerk

APPEAL from a judgment of the Superior Court of Ventura County. Roland N. Purnell, Temporary Judge.* Reversed and Remanded.

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* Pursuant to Cal. Const., art. VI, sec. 21.

Barbara Jean Penny for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Andrew D. Amerson, Deputy Attorneys General and Michael D. Bradbury, District Attorney, and Robert J. Bayer, Deputy District Attorney, for Plaintiff and Respondent.

Defendant appeals from an order of the superior court denying defendant's motion to set aside and vacate the judgment. We reverse the order and remand the case with directions.

SUMMARY OF FACTS

On December 4, 1978, the County of Ventura filed a complaint in the Ventura County Superior Court against defendant, Joyce Tillett, and on January 12, 1978, served defendant with a copy of the summons and complaint. The complaint sought reimbursement of welfare funds which the county had provided in support of defendant's two minor children and requested an order that defendant continue to make monthly child support payments to the county.

In response to the complaint, on January 18, 1979, defendant went to the office of the Ventura County District Attorney. At that time, defendant explained that she had doubts about her responsibility for reimbursing the county because there was a pending order in the County of Los Angeles for her husband to pay child support. She also explained that she was unemployed and could not afford to make any payments. After this discussion, defendant signed a "Judgment for Child Support and Reimbursement of Welfare Funds by Stipulation." Defendant

says that she signed this document because she was afraid that, if she did not sign, she would go to jail and lose her insurance license which she had recently obtained.

The stipulated judgment, filed January 26, 1979, called for defendant to pay $1,148 to the county in monthly installments of $5 as reimbursement for the money which the county had provided in support of defendant's children. Further, the judgment required that defendant continue to pay $100 per month for child support (i.e., $50 per month per child). The defendant did not have the assistance of counsel in negotiating any of the terms of the agreement for stipulated judgment, nor did the agreement itself contain language indicating that defendant had waived any offer by the county to provide counsel.

On August 27, 1979, the court filed an Order to Show Cause Re Contempt against the defendant for nonpayment of child support. On October 12, 1979, defendant appeared before the superior court in propria persona and entered a plea of

guilty to four counts of contempt. She was found guilty by the court and was placed on summary probation for a period of twelve months on the condition that she pay the child support as originally ordered by the court and that she also pay $25 per month toward the arrears on the $1,148 on judgment. The minutes of the proceedings indicate that defendant was advised of the nature of the proceedings and of her right to a trial and representation of counsel, and that defendant waived those rights.

On August 6, 1980, the county filed a declaration Declaration Re Probation Violation against the defendant for noncompliance with the terms of probation (i.e., nonpayment of child support and the arrears). On October 31, 1980, defendant, now represented by counsel, 1/ filed a motion to set aside and vacate the original stipulated judgment on the ground

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1. We are advised by counsel that she has not been paid a fee for her representation on the motion or in this court.

that the judgment was unconstitutional in that defendant did not have representation of counsel in entering into the stipulation. Defendant also claimed that the judgment had been obtained through extrinsic fraud, mistake or accident which prevented defendant from presenting a meritorious defense. The court denied the motion and defendant appeals.

I

We begin by examining the appealability of the superior court's order denying defendant's motion to set aside the judgment of January 26, 1979. Although this issue has not been raised by the parties, the question is jurisdictional, and we must dismiss the appeal on our own motion if the order is not appealable. (Redevelopment Agency v. Goodman (1975) 53 Cal.App.3d 424, 429.) We decide this issue according to the rule that no judgment or order is appealable unless expressly so declared, i.e., unless it comes within one of the classes enumerated in the main statutes or is made appealable by a specific statute. (See 6 Witkin, Cal. Procedure (2d ed. 1971), p. 4045;

see also Jasper Construction, Inc. v. University Casework Systems, Inc. (1974) 39 Cal.App.3d 582, 585.)

The appeal is from an order denying defendant's motion to vacate a stipulated judgment. Generally, an order denying a motion to vacate a judgment is not appealable, since such an appeal would be the equivalent of allowing two appeals from the same judgment. (See generally, 4 Cal.Jur.3d, Appellate Review, § 51 at p. 88.) However, the motion was based on the contention that the judgment is constitutionally invalid. Since a court of this state does not have jurisdiction to render a judgment that violated the California Constitution or the Constitution of the United States, the defendant's argument is, essentially, that the superior court's judgment was in excess of jurisdiction. (Code Civ. Proc., § 410.10; Yoakum v. Small Claims Court (1975) 53 Cal.App.3d 398, 401-402; Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 287-291.) A judgment is void on its face if the court which rendered the judgment lacked

personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant. (Becker v. S.P.V. Construction Co. (1980) 27 Cal.3d 489, 493; Jones v. World Life Research Institute (1976) 60 Cal.App. 3d 836, 840-848.) If the judgment is void, it is subject to collateral attack. (Craft v. Craft (1957) 49 Cal.2d 189, 192.) One method of such an attack is a subsequent motion to vacated or set aside motion may be filed at any time after judgment. (Security Pac. Nat. Bank v. Lyon (1980) 105 Cal.App.3d Supp. 8, 13, citing Hayashi v. Lorenz (1954) 42 Cal.2d 848, 851; see also Craft v. Craft, supra, at p. 192.) The order denying or granting the motion is a special order made after entry of judgment, and it may be directly attacked on appeal under Code of Civil Procedure section 904.1(b). (Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal.2d 274, 282; see also Eveleth v. American Brass & Iron Foundry (1962) 203 Cal.App.2d 41, 44.) The reason for allowing the appeal is that an order giving effect to a void judgment is also void and is subject

to attack. (Security Pac. Nat. Bank v. Lyon, supra, at 13.) Thus when an appellant attacks an order on the ground that it gives effect to a judgment that is void for lack of jurisidiction by the trial court, the general rule prohibiting appeal does not apply. It is a special order, and it may be appealed if the underlying judgment was appealable. (Code Civ. Pro., § 904.1(b).) It is necessary, therefore, to determine whether the stipulated judgment was appealable.

II

A judgment is not appealable unless it is final in the sense that it decides the rights and duties of the parties and terminates the litigation. (Maier Brewing Co. v. Pacific Nat. Fire Ins. Co. (1961) 194 Cal.App.2d 414.) Here, the underlying judgment was entered pursuant to stipulation. Under the terms of the stipulation, the defendant had the continuing right to seek a modification of the amount of child support depending upon a change in any relevant circumstances. When a court has the power to modify orders for the support of children in

light of the circumstances existing at the time the application is made, an order for child support payments pursuant to such power is not usually considered a final judgment in the sense of it being a final adjudication of the rights and duties of the parent and minor child. (Rosher v. Superior Court (1937) 9 Cal.2d 556, 559.) However, if the temporary order directs payment of money or performance of an act, the order is substantially the same as a final judgment in an independent proceeding, and a direct appeal may be taken. This constitutes a necessary exception to the one final judgment rule. (In re Marriage of Skelley (1976) 18 Cal.3d 365, 368, and cases cited therein.) We conclude that the present appeal is permissible under Code of Civil Procedure section 904.1(b) as an appeal from an order made after an appealable judgment. We therefore reach the merits of defendant's claims.

III

Defendant claims that the order denying her motion to vacate the judgment should be reversed for three reasons:

1. Defendant argues that the stipulated judgment is constitutionally invalid because she did not voluntarily, knowingly and intelligently enter the stipulation due to the failure of the county to provide her with assistance of counsel.

2. Defendant argues that the judgment should be vacated because the county fraudulently, mistakenly or accidentally prevented her from obtaining a fair adversary trial by giving her erroneous advice as to her possible defenses.

3. Defendant argues that the trial court erred in its decision of child support in that defendant did not have the ability to make support payments at the time she entered the stipulated judgment.

The first and second of defendant's arguments essentially make the same point, namely, that the judgment should be vacated because defendant did not voluntarily, knowingly and intelligently waive her right to counsel and to trial. Since we conclude that we must reverse and remand the case on that ground, we need not, and do not, consider the third

contention. Where, as here, a judgment is void, it must be set aside and no affidavit of merits or other showing of a defense is required. (Montgomery v. Norman (1953) 120 Cal.App.2d 855, 858.)

In a contested proceeding, no court may render judgment without conforming to the constitutional guarantees which afford due process of law. (See Estate of Buchman (1954) 123 Cal.App.2d 546, 559-560.) Due process requires that all parties be notffied of the facts and issues in dispute, that each party be afforded a fair opportunity to present evidence in open court, and that judgment be rendered based on an evaluation of the evidence on each side, findings of fact and conclusions of law.

In an uncontested proceeding, a court may not enter a final judgment depriving a party of property unless there has been some form of notice to the party and a hearing. (Isbell v. County of Sonoma, supra, (1978) 21 Cal.3d 61, 68.) Since a stipulated judgment authorizes entry of judgment without a hearing and without further notice until after

judgment has been entered against the defendant, we view it as a form of confession of judgment. (See, e.g., County of Ventura v. Castro (1979) 93 Cal.App.3d 462, 469.) It is constitutional only if it constitutes a valid waiver of the debtor's due process rights. (Isbell v. County of Sonoma, supra, at p. 68; see also D. H. Overmeyer Co. v. Frick Co. (1972) 405 U.S. 174, 184-188.)

This was an uncontested proceeding. Defendant did not answer the county's complaint. Instead, defendant signed a document entitled "Judgment for Child Support and Reimbursement of Welfare Funds by Stipulation." Accordingly, the judgment in this case is void, unless defendant knowingly, intelligently and voluntarily waived her right to due process.

In County of Ventura v. Castro, supra, we examined a judgment similar to the one in this case. In Castro, however, no civil action had been filed. The agreement for judgment was entered without action according to the terms worked out

between the District Attorney and the noncustodial parent under the provisions of section 11476.1 of the Welfare and Institutions Code. After examining the agreement, we found that it made no mention of whether the defendant understood his right to a trial on the issues of paternity and child support and whether he freely gave up that right. Since the statute neither required nor provided an opportunity for a judicial determination of the validity of any constitutional waiver, we concluded that the statute was constitutionally defective. Accordingly, the Legislature amended the statute, and it now requires that, before entry of judgment, the defendant must be advised by counsel as to the terms of the agreement or must be granted a hearing by a judge of the court to determine that, under the circumstances of the particular case, the defendant willingly, voluntarily and knowingly waived his or her due process rights. (Welf. & Inst. Code, § 11476.1 as amended by ch. 682, Stats. of 1980.)

Our decision in Castro was limited to cases concerning entry of judgment without action. Here, the District Attorney commenced a civil action under Welfare and Institutfons Code section 11350 and served a copy of the summons and complaint on the defendant. Thereafter, the defendant signed a document for entry of judgment by stipulation. Thus, we are now presented with the issue of whether a stipulated judgment in a civil action under Welfare and Institutions Code section 11350 requires a judicial determination of the validity of any constitutional waiver. We conclude that it does.

Agreements for the entry of judgment by stipulation are recognized as a valid procedure. In fact, there is specific statutory authority for such a process. (See Code Civ. Proc., § 664.6.) Nevertheless, defendant argues that the stipulated judgment against her should be vacated because she did not voluntarily, knowingly and intelligently enter into the stipulation agreement due to her lack of assistance of counsel at the time she entered the agreement. Defendant claims

that she had the constitutional right to assistance of counsel because the stipulated judgment carried with it the threat of incarceration. Defendant maintains that the trial court should have treated the case as a criminal matter and defendant should have been afforded the same rights as any other defendant in a criminal case.

Persons who settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. (Boddie v. Connecticut (1971) 401 U.S. 371, 377; Payne v. Superior Court (1976) 17 Cal.3d 908, 914.) This includes the right to appointed counsel under certain circumstances, regardless of whether the action is labeled civil or criminal. (Salas v. Cortez (1979) 24 Cal.3d 22, 27 and cases cited therein.) Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings.

An indigent defendant in a child support action prosecuted by the district

attorney under Welfare and Institutions Code section 11350 is constitutionally entitled to appointment of free counsel to represent him. (County of Los Angeles v. Superior Court (1980) 102 Cal.App.3d 926, 929.) Two of the most significant reasons for this rule are (1) the exposure of the defendant to a deprivation of property and liberty, and (2) the enormous disparity in bargaining power between indigent defendants and the state. (Salas v. Cortez, supra, at 28-31.) In the absence of such representation, the defendants in such actions are at a distinct disadvantage. As the Supreme Court in Salas said: "Unlike the ordinary civil litigant, appellants were opposed by the full resources of the state, marshalled on plaintiffs' behalf. Pursuant to a state and federal statutory scheme, designed to enforce the support obligations of absent parents, plaintiffs were represented by the district attorney. Further, these actions were prosecuted at public expense. . . . [¶] A judgment rendered in this manner is not only unfair, it is unreliable." Id. at pp. 30, 31. By

"intervening heavily on behalf of one side in what has traditionally been a private dispute, the state has skewed the outcome of the case." (Id., at p. 31.)

The constitutional requirement of appointment of free counsel for indigent defendants in cases that are prosecuted by the state and that carry the threat of incarceration would be reduced to a nullity if the state is allowed to circumvent the requirement by executing stipulated judgments which do not demonstrate that the defendants have voluntarily, knowingly and intelligently waived the right to free counsel and to a trial. Accordingly, we believe that our reasoning in the Castro case is applicable here. If the defendant has not had the assistance of counsel in entering a stipulated judgment with the state, and the judgment carries with it a threat of incarceration, there must be a judicial determination on the issue of waiver. (See County of Ventura v. Castro, supra, at p. 471.) In the absence of such a

determination, the judgment is void. 2/

The county argues that the defendant is not entitled to relief because she is guilty of laches in that more than one and a half years had passed from the entry of judgment in January of 1979 to October of 1980, when defendant moved to have the judgment vacated. (See McCreadi v. Argues (1967) 248 Cal.2d 39.) In passing on this argument we must look to the extent of prejudice to the opposing party and to the reasonableness of the moving party in not filing the motion to vacate earlier. (In re Marriage of Park (1980) 27 Cal.3d 337, 345.) In this case, no claim of prejudice has been articulated by the county. Although defendant waived her right to counsel at the contempt hearing, the speed with which she moved to vacate

---

2. Our reading of the Isbell decision leads us to the conclusion that, under the circumstances of the present case, the stipulated judgment may be declared void as unconstitutional. (Isbell v. County of Sonoma, supra, at p. 75, fn. 9.)

the judgment once she was convicted of contempt shows diligence. Slightly more than two weeks after the contempt hearing, she employed an attorney to file a motion to vacate the original judgment. This can scarcely be denominated inexcusable neglect.

The order denying defendant's motion to vacate the judgment is reversed. The case is remanded to the trial court with directions: (1) to enter an order granting that motion; (2) to allow defendant, properly represented by counsel, to file an answer to the complaint and to have a trial on the issues thus presented. Since defendant's present economic status cannot be determined on the record before us, the trial court shall determine whether she is now entitled to appointed counsel as an indigent. Defendant shall recover her costs in this court.

CERTIFIED FOR PUBLICATION

KINGSLEY, Acting P.J.

We concur:

McCLOSKY, J.

AMERIAN, J.

APPENDIX C

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, Civil No. 63044

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COUNTY OF VENTURA

v.

TILLETT

SUPREME COURT
FILED
SEP 22 1982
LAURENCE P. GILL, Clerk
Deputy

Respondent's petition for hearing DENIED.

Richardson, J., is of the opinion the petition should be granted.

BIRD
Chief Justice

APPENDIX D

Best Copy Available

NAME AND ADDRESS OF ATTORNEY: C. STANLEY THOM, District Attorney
Family Support Division
4274 Telegraph Road
Ventura, CA 93003
ATTORNEY FOR: Plaintiff

TELEPHONE NO: (805) 654-3935

FOR COURT USE ONLY

FILED

JAN 9 1979

ROBERT L. HAMM, County Clerk
By [signature] Deputy County Clerk

Insert name of court, judicial district or branch court, if any, and Post Office and Street Address:
VENTURA COUNTY SUPERIOR COURT
800 South Victoria,
Ventura, CA 93001

PLAINTIFF:
COUNTY OF VENTURA

I hereby certify that the annexed instrument is a true and correct copy of the record on file in my office.
ROBERT L. HAMM, County Clerk of the County of Ventura, State of California and ex-officio Clerk of the Superior Court thereof.
By [signature] Deputy County Clerk 5-21-82

SUPERIOR COURT SEAL VENTURA COUNTY, CALIFORNIA

DEFENDANT:
JOYCE TILLETT, aka
JOYCE PRIDDY

SUMMONS D.A. NUMBER: 78-1237A CASE NUMBER: D98169

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

¡AVISO! Usted ha sido demandado. El Tribunal puede decidir contra Ud. sin audiencia a menos que Ud. responda dentro de 30 días. Lea la información que sigue.

1. TO THE DEFENDANT: A civil complaint has been filed by the plaintiff against you. (See footnote*)
   a. If you wish to defend this lawsuit, you must, within 30 days after this summons is served on you, file with this court a written pleading in response to the complaint. (If a Justice Court, you must file with the court a written pleading or cause an oral pleading to be entered in the docket) Unless you do so, your default will be entered upon application of the plaintiff, and this court may enter a judgment against you for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or property or other relief requested in the complaint.
   b. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be filed on time.

DATED: 12-4-78 ROBERT L. HAMM, Clerk, By [signature], Deputy

(SEAL)

2. NOTICE TO THE PERSON SERVED: You are served
   a. [X] As an individual defendant.
   b. [ ] As the person sued under the fictitious name of:
   c. [ ] On behalf of:

Under: [ ] CCP 416.10 (Corporation) [ ] CCP 416.60 (Minor)
[ ] CCP 416.20 (Defunct Corporation) [ ] CCP 416.70 (Incompetent)
[ ] CCP 416.40 (Association or Partnership) [X] CCP 416.90 (Individual)
[ ] Other:

   d. [ ] By personal delivery on (Date):

*The word "complaint" includes cross-complaint; "plaintiff" includes cross-complainant; "defendant" includes cross-defendant; singular includes the plural and masculine includes feminine and neuter. A written pleading, including an answer, demurrer, etc., must be in the form required by the California Rules of Court. Your original pleading must be filed in this court with proper filing fees and proof that a copy thereof was served on each plaintiff's attorney and on each plaintiff not represented by an attorney. The time when a summons is deemed served on a party may vary depending on the method of service. For example, see CCP 413.10 through 415.40.

Form Approved by Rule 982 of The Judicial Council of California Effective January 1, 1977
DA-SC 1500 (12/76)

(See reverse side for Proof of Service)

SUMMONS

CCP 412.20, 412.30, 415.10, etc.

Best Copy Available

PROOF OF SERVICE

(Use separate proof of service for each person served)

1. I served the defendant (Name): . . . . . with the summons and complaint
   a. by serving
      (1) ☐ Defendant.
      (2) ☐ Person and title or relationship to person served (Name etc.): . . . . . .
   b. ☐ Delivery at ☐ Home ☐ Business
      (1) Date of: . . . . . (2) Time of: . . . . . .
      (3) Address: . . . . . .
   c. ☐ Mailing
      (1) Date of: . . . . . (2) Place of: . . . . . .
2. Manner of service: *(Check proper box)*
   a. ☐ (Personal Service) By personally delivering copies (CCP 415.10).
   b. ☐ (Substituted service on corporation, unincorporated association [including partnership], or public entity) By leaving, during usual business hours, copies in defendant's office with (Name): . . . . . and thereafter mailing, by first-class mail, postage prepaid, copies to defendant (CCP 415.20(a)).
   c. ☐ (Substituted service on natural person, minor, incompetent or candidate) By leaving copies at ☐ the dwelling house ☐ usual place of abode ☐ usual place of business of defendant in the presence of (Name): . . . . . , who was informed of the general nature of the papers, and thereafter mailing by first class mail, postage prepaid, copies to (Name): . . . . . at the place where the copies were left (CCP 415.20(b)). *(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)*
   d. ☐ (Mail and acknowledgement service) By mailing by first-class mail copies to defendant, together with two copies of the form Notice and Acknowledgement of Receipt and a return envelope, postage prepaid, addressed to the sender (CCP 415.30). *(Attach completed Acknowledgment of Receipt form.)*
   e. ☐ (Return receipt requested mail service) By mailing to address outside California, with return receipt requested, copies to defendant (CCP 415.40). *(Attach signed return receipt or other evidence of actual delivery to the person served).*
   f. ☐ (Other—CCP 413.10, 413.30. *Attach separate page if necessary):*

      ☐ Additional page is attached.
3. The notice to the person served (Item 2 on the copy of the summons served) was completed as follows (CCP 412.30, 415.10, and 474):
   a. ☐ As an individual defendant.
   b. ☐ As the person sued under the fictitious name of: . . . . .
   c. ☐ On behalf of: . . . . .
      Under: ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor) ☐ Other:
      ☐ CCP 416.20 (Defunct corporation) ☐ CCP 416.70 (Incompetent)
      ☐ CCP 416.40 (Association or partnership) ☐ CCP 416.90 (Individual)
   d. ☐ by personal delivery on (Date): . . . . .
4. At the time of service I was at least 18 years of age and not a party to the action.
5. Fee for service: $ . . . .
6. Name, address and telephone number of person serving: . . . . .
   a. ☐ Not a registered California process server (CCP 417.40) ☐ and exempt (Bus&P Code 22530).
   b. ☐ Registered. . . . . County, Number: . . . . .
   c. ☐ California sheriff, marshall or constable
      (1) Title: . . . . .
      (2) County: . . . . .
      (3) ☐ Municipal or Justice Court District: . . . . .

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on (Date): . . . . . at (Place): . . . . . , California.

Signature: _____

I certify that the foregoing is true and correct and that this certificate is executed on (Date): . . . . . at (Place): . . . . . , California.

Signature: _____

CCP 417.10—417.30

Best Copy Available

COUNTY OF LOS ANGELES – SHER DEPARTMENT — CERTIFICATE OF SERVICE

COUNTY OF VENTURA (Plaintiff) vs. RIDDY (Defendant) — D 68169 (Case Number)

☐ SUPERIOR
☐ MUNICIPAL JAN 5 1979

COURT OF CALIFORNIA, COUNTY OF VENTURA JUDICIAL DISTRICT

I, the undersigned, Sheriff of the County of Los Angeles, State of California, do hereby certify that I received on the _____ day of _____ 19__, the attached:

☑ Summons and COMPLAINT
☐ Petition (Marriage)
☐ Order to Show Cause (Marriage).
☐ Blank Financial Declaration.
☐ Blank Confidential Counseling Statement (Marriage).
☐ Blank Responsive Declaration.
☐

I served the above process as follows:

1. Name: JOYCE TILLET

I hereby certify that the annexed instrument is a true and correct copy of the record on file in my office.
ROBERT L. HAMM, County Clerk of the County of Ventura, State of California and ex-officio Clerk of the Superior Court therein.
By _____ Deputy County Clerk 3-21-82

SUPERIOR COURT VENTURA COUNTY, CALIFORNIA

2. Person served and title: JOYCE TILLET
3. Person with whom left, title or relationship to person served:
4. Date and time of delivery: 12-28-78 3:00 PM
5. Mailing date, type of mail and place of mailing:
6. Address, city and state (when required, indicate whether address is home or business): 11744 KITRIDGE #1 NORTH HOLLYWOOD N/A
7. Manner of Service: (Check application box)

☑ (Personal service) By handing copies to the person served. (C.C.P. § 415.10)

☐ (Substitute service on corporation, unincorporated association (including partnership), or public entity) By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first class mail, postage prepaid) copies to the person served at the place where the copies were left (C.C.P. § 415.20(a).)

☐ (Substituted service on natural persons, minor, incompetent, or candidate) By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (C.C.P. § 415.20(b). (SEE REVERSE FOR ACTS RELIED ON TO ESTABLISH REASONABLE DILIGENCE IN FIRST ATTEMPTING PERSONAL SERVICE)

☐

8. The following notice appeared on the copy of the summons served (CCP 412.30 or 474):

☑ You are served as an individual defendant.
☐ You are served as (or on behalf of) the person sued under the fictitious name of: _____
☐ You are served on behalf of: _____

Under: ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor) ☐ Other:
☐ CCP 416.20 (Defunct corporation) ☐ CCP 416.70 (Incompetent)
☐ CCP 416.40 (Association or partnership) ☐ CCP 416.90 (Individual)
☐ By personal delivery on _____

(continued on reverse side)

Best Copy Available

☐ **CERTIFICATE OF NON-SERVICE**

I certify that I received the annexed civil process on the date endorsed thereon by me, and that after due search, careful inquiry and diligent attempts at the dwelling house or usual place of abode and/or business, I have been unable to make personal delivery of said process in the County of Los Angeles, on the following person(s) therein named, to Wit:

RECORD OF SERVICE ATTEMPTS RELIED TO ESTABLISH REASONABLE DILIGENCE: OVERALL TOTAL OF ATTEMPTS MADE: ___

Dates and Times	Address		Remarks
		☐ Home ☐ Bus.	
		☐ Home ☐ Bus.	
		☐ Home ☐ Bus.	
		☐ Home ☐ Bus.	

REASON:

- ☐ Unknown at address.
- ☐ Unable to serve before
- ☐ No such address.
- ☐ Other reasons:
- ☐ Moved, forwarding address unknown.
- ☐ Service cancelled by litigant.

WITNESS AND MILEAGE FEES DEMANDED AND PAID $ _____.

HEARING DATE: _____, AT _____ M. DIVISION OR DEPARTMENT _____

I certify that the foregoing is true and correct and that this certificate was executed on 1-2-79 at Van Nuys, California.

Fees for Service $ -0-

PETER J. PITCHESS, SHERIFF

By Fred P. Burke
Deputy Sheriff

CERTIFICATE NON-SERVICE/SERVICE ATTEMPTS

Office-Supreme Court, U.S.
FILED
MAR 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1008

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COUNTY OF VENTURA,

Petitioner,

vs.

JOYCE TILLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BARBARA JEAN PENNY

14414 Hamlin Street
Van Nuys, CA 91401
(213) 988-6625

Attorney for Respondent

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. 82-1008

COUNTY OF VENTURA,

Petitioner,

v.

JOYCE TILLETT,

Respondent.

RESPONSE TO PETITION

FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Your respondent submits that the questions presented should be more narrowly presented to read as follows:

1. Before an unrepresented indigent defendant who has already been served with a summons and complaint in a suit filed by a county for child support alone, when

paternity is not at issue, can enter into a stipulated judgment to pay child support, which judgment carries with it the threat of incarceration, does the Fourteenth Amendment first require the holding of a prejudgment judicial hearing at which such defendant must waive the right to notice and the right to a hearing on the merits?

2. Does the Fourteenth Amendment require the appointment of counsel for indigent defendants who are exposed to a deprivation of property and liberty as a result of the filing and service of a civil suit instituted and ultimately prosecuted by the county for child support alone when paternity is not an issue?

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	4
INTRODUCTION	5
STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	5
ARGUMENT	6
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	PAGES
D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 31 L.Ed.2d 124, 92 S.Ct. 775	14
CONSTITUTION	
Fourteenth Amendment	2, 6, 18
STATUTES	
Cal.Welf. & Inst. Code §11350.1	5

INTRODUCTION

As a clarification of the statutory provisions involved, your respondent believes that the following portion of California Welfare and Institution Code Section 11350.1 is also relevant:

> "... Nothing herein contained shall be construed to prevent the parties from bringing an independent action under the Family Law Act or otherwise, and litigating the issue of support. In such event, the court in such proceedings shall make an independent determination on the issue of support which shall supercede the order made pursuant to this section."

STATEMENT OF CASE

To clarify petitioner's statement of the case, respondent would submit that although the County of Ventura was

acting on behalf of two of Joyce Tillett's minor children, she had three children, one of which was living with her at this time.

When Joyce Tillett went to the District Attorney's office in the County of Ventura, she advised a representative of the office, whose name is not known, that there was a pending order in the County of Los Angeles for her husband to pay child support payments.

In addition, she advised them that she was not working and could not afford to pay payments.

ARGUMENT

The Petition for Writ of Certiorari should be denied for the following reasons:

1. The Fourteenth Amendment does

mandate a knowing, intelligent and voluntary waiver when a defendant waives their right to due process. The California Court of Appeal properly found that a judgment is void unless such a waiver is on the record.

It would not have been so difficult for the District Attorney's Office in the County of Ventura to have advised defendant of her defenses so that she could properly assess the situation and proceed accordingly.

It is just such conduct as this by a county agency that mandates additional safeguards for indigent defendants.

The petitioner urges upon us the proposition that since defendant had been served with a summons and complaint she had the opportunity to appear and to contest the issue on the merits.

When defendant received the summons

and complaint, she did the only thing that a law-abiding person without funds could do, she contacted the District Attorney's Office in the County of Ventura in an effort to clear up the matter.

She was induced by them to come into their office to see if they could reach some agreement for repayment of the monies paid out by them.

Joyce Tillett had no money to retain an attorney, she was not advised of any of her rights or defenses that she may have had to the action, and there was no provision for any prejudgment judicial determination on the issue of waiver even though the judgment entered could deprive defendant of personal property and her freedom. Under the circumstances in which the stipulation for judgment was entered into, it could not be presumed that it was voluntarily executed.

In any instance when a defendant has a county or state agency as his adversary, he must be afforded his constitutional rights as there is no doubt that the county or state has a superior position. There must be safeguards to protect the unsuspecting defendant.

Your petitioner would have us believe that if their Petition for Writ of Certiorari is not granted and the holding in this case is allowed to stand that neither society nor children in particular would be benefited.

They state if certiorari is not granted thousands of child support judgments will be treated as constitutionally void and thousands of children will then be left without support from their parents.

If we are to take the County of Ventura v. Tillett as an average case

that is being handled by the County of Ventura District Attorney's Office, it would certainly save hours of judicial time if there is a judicial determination of the validity of any constitutional waiver.

In the case at bar your defendant, Joyce Tillett, went to the District Attorney's Office and executed a stipulation for judgment. This stipulation was submitted to the judge for his signature only. At this point we have possibly five minutes of judicial time involved.

However, what is the result of this procedure?

When there is an indigent defendant entering into a stipulation to pay money which she could ill-afford, there can only be one result and that is a contempt proceeding for nonpayment of the

stipulated support.

Therefore, the District Attorney's Office brought a contempt action for nonpayment of the stipulated judgment against Joyce Tillett and Tillett appeared in court in pro per at which time she pled guilty to four counts of contempt.

At this point we have more court time and additional hours being spent by the District Attorney's Office in paperwork and appearances.

At the time the second contempt action was brought against Joyce Tillett she was, in spite of her economic circumstances, forced to find an attorney who would take her case on a pro bono basis.

The defendant and I appeared in court, once again a judicial hearing, we had a conference with the court, the

matter was put over for additional investigation by defendant's attorney, we appeared back in court on the motion to vacate, and then went forward with the hearing at that time.

Had Joyce Tillett not sought out an attorney and had been found guilty of contempt she would have either gone to jail or been admonished by the court that she must start making payments or face a jail sentence.

Here again, if Tillett did not have the means to pay by that time, she would once again be in contempt and additional judicial time would have been spent.

Should Joyce Tillett have gone in without an attorney and been incarcerated, then here we could have some more of the taxpayers' money used to keep Joyce Tillett in a jail cell for nonpayment of support which she could ill-afford at the

time she went in and entered into her original stipulation.

In the alternative a judicial determination of the validity of the waiver of Joyce Tillett's constitutional rights could be quickly ascertained on the issue of whether she had knowingly, intelligently and voluntarily waived her right to due process.

Your respondent does not believe that by affording indigent defendants their right to counsel in actions brought by a state or county agency that thousands of children will be left without support from their parents.

It appears that the County of Ventura is attempting to force on us the proposition that since they have been using the same procedures as used against Joyce Tillett for some period of time, that, although these may not be handled

with due regard to a person's constitutional rights, they should be allowed to continue these procedures because otherwise thousands of children will be left without support from their parents.

I do not believe that one necessarily follows the other since the County of Ventura has not pointed out why thousands of children will be left without support from their parents.

Would they have us believe that there are not Penal Code sections under which they are protected?

In addition, I do not understand why the County of Ventura would want a judgment for an indigent parent to pay support anyway.

Could not the indigent parent who is not earning to his ability be subjected to the same procedures as are used in

family court? In our family law cases in our civil courts a parent who is not working is given a couple of months to find a job and to return to court at that time.

In addition, they can be forced to undergo testing by a rehabilitation counselor to ascertain what the party's actual earning ability is and to determine if the party is not actually earning to that ability.

Why would not these simple procedures be less expensive and in the best interest of all parties?

Why could not the County of Ventura have advised Joyce Tillett, in writing, of her possible defenses, so that she could ascertain if she had a valid defense to the action brought by the County of Ventura?

What justice can possibly result from

a person being circumvented from defending on the merits?

Your petitioners point to the case of D.H. Overmyer Co. v. Frink Co., 405 U.S. 174, 31 L.Ed.2d 124, 92 S.Ct. 775, for the proposition that stipulated judgments for child support meet constitutional requirements for due process.

Overmyer can be easily distinguished from the case at bar in that in the Overmyer case the cognovit note had resulted from negotiations conducted by counsel for both parties.

The court stated in Overmyer that confessions of judgment were constitutional if, 1) supported by consideration of creditor, 2) it resulted from negotiations between parties of equal bargaining power, and 3) a valid defense was authorized by Ohio procedure.

Petitioners would have us believe

that by handing a summons and complaint to an indigent defendant that that is all which is required to satisfy the due process requirement of notice and opportunity for hearing.

Notice and opportunity to appear and defend carries with it the assumption that one knows what their defenses are.

In the within action, the County of Ventura well knew what Mrs. Tillett's defenses were but they would not tell her.

How can this be considered due process?

In the within action, the petitioner urges on us the fact that both parties came together and worked out an agreement satisfactory to both.

That is not the case at all. In this case, two parties of unequal bargaining strength came together and respondent Tillett came out of it with a stipulation to pay a judgment which she could not

afford. She was not working. This cannot be an agreement that is satisfactory to both parties.

CONCLUSION

Wherefore, your respondent urges that:

1. Before an unrepresented indigent defendant who has aleady been served with a summons and complaint filed by a county for child support, when paternity is not at issue, can enter a stipulated judgment to pay child support, which judgment carries with it the threat of incarceration, the Fourteenth Amendment does require the holding of a prejudment judicial hearing, at which such defendant must waive the right to notice and the right to a hearing on the merits.

2. The Fourteenth Amendment does require the appointment of counsel for indigent defendants who are exposed to a

deprivation of property and liberty as a result of the filing and service of a civil suit instituted and ultimately prosecuted by the county for child support alone when paternity is not at issue.

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BARBARA JEAN PENNY
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